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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1076

JOHN R. BEALL,

Petitioner,

v.

BOB T. JEFFERSON,

Respondent.

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, Texas

RESPONDENT'S BRIEF IN OPPOSITION

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WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3120

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RESPONDENT'S BRIEF IN OPPOSITION

To the Honorable Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

STATEMENT

Respondent, Bob T. Jefferson, sued petitioner, John R. Beall, for damages resulting from petitioner's negligence in diagnosing and treating respondent's wife, Alta Lee Jefferson. The Court properly charged the jury as to the degree

of care required of petitioner as a medical doctor practicing in Dallas County, Texas, and after hearing all the testimony, including testimony by another medical doctor, the jury found petitioner was negligent and that such negligence was a proximate cause of the damages found by the jury to have been sustained by respondent.

REASONS FOR DENYING THE WRIT

The petitioner's first question regarding the failure of petitioner's former counsel to present points of error in his motion for rehearing in the Court of Civil Appeals, and the resulting dismissal by the Supreme Court of Texas of petitioner's application for writ of error for want of jurisdiction, is in effect raising the question of whether the failure to have another hearing in the Supreme Court of Texas after having previously had full and complete hearings in both the trial court and the Court of Civil Appeals, deprived petitioner of due process of law.

It has previously been held that the right of appeal or review is not essential to due process, provided due process has already been accorded in the tribunal of first instance, *District of Columbia v. Clawans*, 300 U.S. 617, 81 L. Ed. 843, 57 S. Ct. 660; *Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 74 L. Ed. 710, 50 S. Ct. 228; *Luckenbach S. S. Co. v. United States*, 272 U.S. 533, 71 L. Ed. 394, 47 S. Ct. 186, and no violation of constitutional law is involved in a court's insistence that a statutory right of appeal be exercised according to the lawful rules of the Court. *Meyer v.*

Territory of Hawaii, 164 F. 2d 845 (9th Cir. 1947), cert. den. 333 U.S. 860, 92 L. Ed. 1139, 68 S. Ct. 738.

In answer to petitioner's second question, respondent, in addition to the argument and authorities presented above in answer to the first question, submits that the record shows petitioner was adequately represented by counsel of his own choice both in the trial court and the Court of Civil Appeals. The jury in the trial court, in finding that petitioner's acts and omissions amounted to negligence, found that petitioner failed to exercise that degree of care which would be exercised by an ordinarily prudent medical doctor in Dallas County, Texas, under the same or similar circumstances, as the jury was instructed by the Court that "negligence", as that term is used in the Court's charge to the jury, means "the failure to exercise ordinary care", and that "ordinary care", as that term is used in the Court's charge, means "that degree of care which would be exercised by an ordinarily prudent medical doctor in Dallas County, Texas, under the same or similar circumstances" (R. Vol. I—page 31). The burden was on respondent to plead and then prove, by a preponderance of the evidence, that petitioner was negligent as that term was defined in the Court's charge, and petitioner's counsel, as shown by his pleadings (R. Vol. I—page 13), denied respondent's allegations. This denial placed in issue the question of petitioner's negligence, thus presenting the defensive theory which the jury rejected after hearing both the evidence presented by respondent and the evidence presented by petitioner.

In addition to the foregoing, and without intending in any way to imply that there was ineffective assistance of counsel in this case, respondent would emphasize that all cases cited by petitioner with respect to ineffective assistance of counsel involved criminal offenses.

CONCLUSION

Respondent respectfully submits that no substantial Federal question is involved in this case, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS G. NASH, JR.,
336 Fidelity Union Tower,
Dallas, Texas 75201,
Attorney for Respondent.

I, Thomas G. Nash, Jr., one of the attorneys for Bob T. Jefferson, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 29TH day of March, 1966, I served a copy of the foregoing Respondent's Brief in Opposition on petitioner, John R. Beall, by mailing the copy in a duly addressed envelope, with first class postage prepaid, to Curtis E. Hill, counsel of record for petitioner, at 605 North Ervay, Dallas 1, Texas.

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Attorney for Respondent

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PETITION FOR REHEARING OF THE ORDER OF APRIL 18, 1966, DENYING PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING OF THE ORDER OF APRIL 18, 1966, DENYING PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that the Court grant rehearing of its order of April 18, 1966, denying the petition for writ of certiorari, that said order of denial be set aside and that a writ of certiorari issue to review the judgment and order of the Court of Civil Appeals for the Sixth Supreme Judicial Distict of Texas at Texarkana, Texas in the above entitled cause as prayed for in the petition for writ of certiorari herein filed on March 1, 1966.

ADDITION TO THE STATEMENT CONTAINED IN THE PETITION FOR WRIT OF CERTIORARI AT PAGES 5 AND 6

On account of the hurriedness with which the petition for writ of certiorari was completed and filed herein on March 1, 1966, no effort was made to articulate the Statement at pages 5 and 6 of petition for writ of certiorari with the certified copy of the record which was filed with said petition. We have printed as Appendix A hereto to the provisions of the Texas Rules of Civil Procedure which establish and indicate the procedural methods by which petitioner's counsel, prior to motion for rehearing in the Supreme Court of Texas, could have and should have presented to all of the courts of the state judicial system of the State of Texas which had jurisdiction of this litigation, the defensive matter indicated by the Questions Presented and particularly (2) thereof—at pages 3 and 4 of the petition for writ of certiorari, which, had same been properly presented and had any court of the state judicial system ruled correctly thereon, would have caused this litigation to have resulted favorably to petitioner at the pleading stage in probability and at the instructed verdict stage in certainty. We have been unable to devise a more convenient method of showing the Court of the failures of petitioner's said counsel which constitute a deprivation of petitioner of due process of law in the implementation of the judicial proceedings through the courts of the state judicial system than to first present the procedural rules of law shown in Appendix A

and then invite the attention of the Court to the record of such state court judicial proceedings.

Any freshman law school student, as petitioner's counsel would have understood his clear duty to petitioner in the considered circumstances. Furthermore, every freshman law school student understands that assignments of error are foundational to the rule of res judicata; that without the rule of res judicata the judicial process cannot be implemented, and that failure to make assignments of error at each and every procedural opportunity therefor, causes a loss of any error, except such as are fundamental, which are not assigned as a ground for reversal and in consequence, loss of the litigation in which such failure to make assignments of error occurs.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Human beings on Earth everywhere are aware: (1) that under methods established on modern science for the production of goods and services for the satisfaction of human needs and wants, no human being on Earth should be hungry, diseased or poverty ridden; (2) that nevertheless, a great majority of all human beings on Earth are hungry, diseased and poverty ridden, and (3) that in the circumstances of such two facts obtaining at the same time, there can be no cause of a great majority of all human beings on Earth being hungry, diseased and poverty ridden than the inadequacies of the Earth wide total method of societal system now in establishment and implementation. In consequence of such wide differential between the *actual* satisfaction of human needs